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# In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS LEE DEAL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

WILLIAM C. BRYSON
*Deputy Solicitor General*

MIGUEL A. ESTRADA
*Assistant to the Solicitor General*

ROBERT J. ERICKSON
*Attorney*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTION PRESENTED

Whether a defendant who is convicted in a single proceeding of multiple violations of 18 U.S.C. 924(c) is subject to the statute's provisions imposing a more severe sentence for a "second or subsequent conviction."

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statute involved | 2 |
| Statement | 3 |
| Summary of argument | 6 |
| Argument: | |
| Section 924(c)'s enhancement provision applies whenever a defendant is convicted for a "second or subsequent" offense under the statute, irrespective of when those offenses occur or whether those offenses are tried in a single indictment | 8 |
| A. Congress used expansive and unqualified language in providing for enhanced penalties for a "second or subsequent conviction" | 9 |
| B. The legislative history of Section 924(c) reflects a purpose to impose enhanced penalties on offenders who are found guilty of multiple violations under the statute, without regard to the timing or order of those convictions | 18 |
| C. The rule of lenity casts no doubt on the court of appeals' conclusion in this case | 24 |
| Conclusion | 27 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Busic* v. *United States*, 446 U.S. 398 (1980) | 18 |
| *Callanan* v. *United States*, 364 U.S. 587 (1961) | 25 |
| *Caminetti* v. *United States*, 242 U.S. 470 (1917) | 10 |
| *Chapman* v. *United States*, 111 S. Ct. 1919 (1991) | 13, 25, 26 |
| *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989) | 10 |
| *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983) | 6, 11, 12 |
| *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992) | 14 |

Cases—Continued: Page

*Gozlon-Peretz* v. *United States*, 111 S. Ct. 840 (1991) ..... 25
*Huddleston* v. *United States*, 415 U.S. 814 (1974) .. 25
*King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570 (1991) ..... 10
*Lewis* v. *United States*, 445 U.S. 55 (1980) ..... 12, 16
*Lorillard* v. *Pons*, 434 U.S. 575 (1978) ..... 23
*Moore* v. *Missouri*, 159 U.S. 673 (1895) ..... 16
*Moskal* v. *United States*, 111 S. Ct. 461 (1990) .... 9, 13, 25, 26
*Rodriguez* v. *United States*, 480 U.S. 522 (1987) .... 23
*Russello* v. *United States*, 464 U.S. 16 (1983) ..... 25
*Scarborough* v. *United States*, 431 U.S. 563 (1977) ..... 12
*Sorrells* v. *United States*, 287 U.S. 435 (1932) ..... 26
*United States* v. *Abreu*, 962 F.2d 1447 (10th Cir. 1922), petition for cert. pending, No. 92-67 ....9, 12, 15
*United States* v. *Bass*, 404 U.S. 336 (1971) ..... 25
*United States* v. *Bennett*, 908 F.2d 189 (7th Cir.), cert. denied, 111 S. Ct. 534 (1990) ..... 9, 14
*United States* v. *Bernier*, 954 F.2d 818 (2d Cir. 1992), petition for cert. pending, No. 92-5025 .... 9, 18
*United States* v. *Brown*, 333 U.S. 18 (1948) ..... 14
*United States* v. *Fisher*, 6 U.S. (2 Cranch) 358 (1805) ..... 25
*United States* v. *Foote*, 898 F.2d 659 (8th Cir.), cert. denied, 111 S. Ct. 112 (1990) ..... 9, 14
*United States* v. *Nabors*, 901 F.2d 1351 (6th Cir.), cert. denied, 111 S. Ct. 192 (1990) ..... 9, 14
*United States* v. *Neal*, 976 F.2d 601 (9th Cir. 1992) ..... 9
*United States* v. *Rawlings*, 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1987) .....7, 9, 14, 15
*United States* v. *Raynor*, 939 F.2d 191 (4th Cir. 1991) .....9, 10, 13-14, 15, 16, 17
*United States* v. *Rodgers*, 466 U.S. 475 (1984) .... 25, 26
*United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) ..... 10
*United States* v. *Turkette*, 452 U.S. 576 (1981) .... 9-10



Statutes and rule: Page

Dangerous Special Offender Statute, 18 U.S.C. 3575(e) (1976) ..... 17
Gun Control Act of 1968, Pub. L. No. 90-618, Tit. I, § 102, 82 Stat. 1223 ..... 18
82 Stat. 1224 ..... 21
Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. IV, § 902, 82 Stat. 226 (18 U.S.C. 922(g)-(h)) ..... 11
18 U.S.C. 921(a)(20) ..... 13
18 U.S.C. 922(g) ..... 3, 17
18 U.S.C. 922(g)(1) ..... 11
18 U.S.C. 922(h)(1) ..... 11
18 U.S.C. 924(c) ..... *passim*
18 U.S.C. 924(c)(1) (Supp. II 1990) ..... 2, 17
18 U.S.C. 924(e) ..... 17
18 U.S.C. 2113(a) ..... 3
18 U.S.C. 2113(d) ..... 26
21 U.S.C. 962 ..... 17
21 U.S.C. 962(b) ..... 17
28 U.S.C. 994(h) ..... 17
Fed. R. Crim. P. 32(b)(1) ..... 11

Miscellaneous:

114 Cong. Rec. (1968):
p. 22,229 ..... 19
pp. 22,229-22,248 ..... 21
p. 22,230 ..... 19
p. 22,231 ..... 19, 20, 21, 22
p. 22,233 ..... 19
p. 22,234 ..... 19, 21
p. 22,236 ..... 21
p. 22,237 ..... 19, 21
pp. 22,239-22,240 ..... 19
p. 22,242 ..... 19
p. 22,243 ..... 19, 21
p. 22,244 ..... 19
p. 22,245 ..... 19, 21, 22
p. 22,246 ..... 19
p. 22,248 ..... 20
pp. 22,247-22,248 ..... 22
p. 30,587 ..... 20

Miscellaneous—Continued: Page

115 Cong. Rec. (1969):
p. 34,838 ..... 23
pp. 34,838-34,840 ..... 22
116 Cong. Rec. 35,734-35,735 (1970) ..... 22
134 Cong. Rec.:
p. S14,071 (daily ed. Oct. 3, 1988) ..... 23
p. S17,365 (daily ed. Nov. 10, 1988) ..... 23
H.R. 17,735, 90th Cong., 2d Sess. (1968) ..... 19
H.R. Conf. Rep. No. 1768, 91st Cong., 2d Sess. (1970) ..... 22
H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. (1968) ..... 20, 21
H.R. Rep. No. 495, 99th Cong., 2d Sess. (1986) ..... 23
S. 3633, 90th Cong., 2d Sess. (1968) ..... 19
*Webster's Third International Dictionary* (1986) ..... 11, 13

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (J.A. 31-34) is reported at 954 F.2d 262.

### JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. The petition for a writ of certiorari was filed on May 7, 1992, and was granted

on October 5, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTE INVOLVED

18 U.S.C. 924(c)(1) (Supp. II 1990) provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.



## STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on six counts of bank robbery (Counts 1, 3, 5, 7, 9, and 11), in violation of 18 U.S.C. 2113(a) and (d); six counts of using a firearm in relation to a crime of violence (Counts 2, 4, 6, 8, 10, and 12), in violation of 18 U.S.C. 924(c); and one count of possessing a firearm as a previously convicted felon (Count 13), in violation of 18 U.S.C. 922(g). J.A. 28. Petitioner was sentenced to concurrent terms of 14 years' imprisonment on each of the bank robbery counts and to a concurrent term of 10 years' imprisonment on the felon-in-possession count. J.A. 29. Those sentences were followed by a consecutive term of five years' imprisonment on the Section 924(c) charge in Count 2 and by additional consecutive terms of 20 years' imprisonment on each of the Section 924(c) charges in Counts 4, 6, 8, 10 and 12. J.A. 29-30. In all, petitioner was sentenced to 105 years' imprisonment on the Section 924(c) counts, for a total sentence of 119 years' imprisonment. The court of appeals affirmed. J.A. 31-34.

1. The evidence at trial showed that petitioner, who had previously been convicted of five armed bank robberies and was then on parole,[1] committed six bank

[1] Petitioner pleaded guilty on February 20, 1976, to federal charges arising from his commission of five armed bank robberies between January 1973 and September 1975. See Presentence Investigation Report 15-17. Petitioner received a cumulative sentence of 30 years' imprisonment and was ultimately released on parole on December 8, 1989—approximately six weeks before the instant series of armed bank robberies commenced.

robberies in the Houston, Texas, area during a four-month period in early 1990. The offenses occurred at the Ameriway Bank on January 24 and February 23; at the Fountainview branch of the Charter National Bank on March 1; at the Galleria branch of the Charter National Bank on March 5; at the First Texas Bank on March 13; and again at the Fountainview branch of the Charter National Bank on April 12, 1990.

Petitioner's *modus operandi* was similar in each case. Wearing disguises that included a hat, a false mustache, and a wig, petitioner approached the bank tellers, opened his jacket to display a handgun, placed a duffel bag on the counter, and ordered the tellers to fill it. At trial, seven tellers identified petitioner as the armed man who had robbed them. I Tr. 21-22, 24, 46, 61-62, 64-65, 86, 102, 113-114, 126-127. In addition, petitioner made a statement to the police admitting his commission of each of the six charged robberies (II Tr. 58-61), and in a search of his residence, the police found proceeds from the robberies, disguise materials, and firearms. I Tr. 142-143; II Tr. 27, 50-52.

2. At sentencing, petitioner's counsel objected to the imposition of enhanced 20-year prison sentences as a result of petitioner's multiple convictions under 18 U.S.C. 924(c). J.A. 25-27. As counsel argued, "[t]he whole point" of Section 924(c)'s enhanced penalty provision was to "provide extra punishment for those who * * * did not learn their lesson from serving time the first time." J.A. 25-26. That purpose would be "defeated" in the present case, according to counsel, "[b]ecause [petitioner] never had an opportunity to serve the first sentence [for a Section



924(c) violation] by which he would be given an opportunity before being convicted a second time [and] receiving the enhanced punishment." J.A. 26.

The district court rejected petitioner's argument. As the court stated, "I have analyzed the enhancement statute as carefully as I can and it seems to me perfectly obvious what Congress is telling us is that we must consider each of these firearms offenses as separate offenses." J.A. 26. Thus, in addition to the Guidelines sentences totaling 14 years' imprisonment imposed as a result of petitioner's convictions on the bank robbery and unlawful possession counts, the court sentenced petitioner to a consecutive term of five years' imprisonment on his first Section 924(c) conviction and to consecutive terms of 20 years' imprisonment for the second and each subsequent Section 924(c) conviction. In so doing, the court noted that petitioner's recurring pattern of armed and dangerous criminal conduct made it "important not only that [petitioner] * * * [be] punish[ed] * * * but that [he] * * * [be] incapacitate[d]." J.A. 27.

3. The court of appeals affirmed. J.A. 31-34. The court noted that "the counts alleging violations of § 924(c)[] related to bank robberies committed on different days involving different banks and different times." J.A. 34. The court of appeals also noted that five courts of appeals that had previously considered the question had agreed that "a 'second or subsequent conviction' under 18 U.S.C. § 924(c) can result from the same indictment as the first conviction under § 924(c)." J.A. 33. Adopting the same rule, the court of appeals concluded that "the District Court correctly imposed the proper sentence in this case, including the enhancements resulting from

'second or subsequent' convictions under 18 U.S.C. § 924(c)." J.A. 34.

## SUMMARY OF ARGUMENT

By its terms, Section 924(c) requires a 20-year sentence for each violation of the statute, except for the first. Nothing in the statutory language or the relevant legislative history suggests that Congress intended to preclude application of that enhanced penalty provision when multiple violations of Section 924(c) are charged in the same indictment and the defendant is convicted in a single trial. Because the statutory language is plain, there is no occasion to apply the principles of lenity on which petitioner relies.

1. Section 924(c) provides that "[i]n the case of [a defendant's] second or subsequent conviction * * * [he] shall be sentenced to imprisonment for twenty years." Read in context, the word "conviction" refers to a finding of guilt by a court or jury, a reading that comports with the broad meaning this Court has given to the same term in related statutes. See *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983). The word "conviction" cannot mean a judgment of conviction, as petitioner contends, because such a judgment is entered only after sentence is passed, and a provision prescribing what sentence a defendant is to receive upon such a "conviction" makes no sense. Thus, giving the words "second" and "subsequent" their common and ordinary meanings, the phrase "second or subsequent conviction under this subsection" must be read—as eight courts of appeals have—to mean any finding of guilt under Section 924(c) other than the first such finding.



2. In light of the clarity of the statutory language, recourse to legislative history is unnecessary. In any event, the legislative history of Section 924(c) casts no doubt on the conclusion reached by the courts below and by the great majority of courts of appeals to consider the question. The 1968 debate indicates that the sponsor of the legislation and those who supported it believed that the enhanced penalties for "second or subsequent" convictions were necessary to deter those most likely to use firearms to commit crimes—*i.e.*, those persons who had done so once before. Indeed, it is apparent both from the debate surrounding the original enactment of Section 924(c) and from the debates and reports relating to subsequent amendments that Members of Congress understood the phrase "second or subsequent conviction" to refer simply to the commission of additional offenses that ultimately resulted in convictions. Congress's 1988 amendment of Section 924(c) to increase the penalties for "second or subsequent" convictions from 10 to 20 years' imprisonment is particularly damaging to petitioner, since it postdated the Eleventh Circuit's decision in *United States* v. *Rawlings*, 821 F.2d 1543, cert. denied, 484 U.S. 979 (1987), and was not accompanied by any statement casting doubt on the correctness of its holding. It is implausible to suggest that Congress believed it imperative to increase the punishments available for repeat offenders, but did so without an understanding of how those punishments were being meted out.

3. Petitioner can derive no help from the rule of lenity. This Court has repeatedly emphasized that the touchstone of lenity is "grievous ambiguity," such that even after invoking every aid to statutory

interpretation the Court is left with an ambiguous statute. The rule is not applicable merely because it is possible to articulate a construction of the statute that is narrower than that urged by the government. Nor is lenity appropriate solely because of the length of petitioner's total sentence. While petitioner's sentence is concededly severe, it is not disproportionate to his extraordinary course of violent crime. And the fact that petitioner was able to evade law enforcement and commit numerous felonies in the interim does not render his total sentence so glaringly unjust as to raise a reasonable doubt about Congress's intent.

## ARGUMENT

### SECTION 924(c)'S ENHANCEMENT PROVISION APPLIES WHENEVER A DEFENDANT IS CONVICTED FOR A "SECOND OR SUBSEQUENT" OFFENSE UNDER THE STATUTE, IRRESPECTIVE OF WHEN THOSE OFFENSES OCCUR OR WHETHER THOSE OFFENSES ARE TRIED IN A SINGLE INDICTMENT

Section 924(c) of Title 18 provides that a person who uses or carries a firearm during and in relation to a crime of violence or a drug trafficking crime shall be sentenced to imprisonment for five years. The statute further provides that "[i]n the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years." Those sentences may not be suspended, nor may they run "concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried."

The question in this case is whether the sentence enhancement provision applies only to "second or subsequent" convictions that occur after a judgment



of conviction has been entered on a prior offense. A divided Tenth Circuit, sitting en banc, has taken that restrictive view. See *United States* v. *Abreu*, 962 F.2d 1447 (1992), petition for cert. pending, No. 92-67. Petitioner agrees with the Tenth Circuit, arguing that because the phrase "second or subsequent conviction" has more than one possible meaning, the phrase is insolubly ambiguous and must be construed in favor of lenity. Eight courts of appeals, however, have concluded that the statutory language unambiguously requires the enhanced sentence for each violation of Section 924(c) committed after the first such offense, even when, as here, the multiple Section 924(c) violations are charged in the same indictment and the defendant is convicted in a single trial. See *United States* v. *Neal*, 976 F.2d 601 (9th Cir. 1992); *United States* v. *Bernier*, 954 F.2d 818, 820-821 (2d Cir. 1992), petition for cert. pending, No. 92-5025; *United States* v. *Raynor*, 939 F.2d 191, 193-194 (4th Cir. 1991); *United States* v. *Bennett*, 908 F.2d 189, 194 (7th Cir.), cert. denied, 111 S. Ct. 534 (1990); *United States* v. *Nabors*, 901 F.2d 1351, 1358-1359 (6th Cir.), cert. denied, 111 S. Ct. 192 (1990); *United States* v. *Foote*, 898 F.2d 659, 668 (8th Cir.), cert. denied, 111 S. Ct. 112 (1990); *United States* v. *Rawlings*, 821 F.2d 1543, 1546 (11th Cir.), cert. denied, 484 U.S. 979 (1987). For the reasons set forth below, the majority view is correct.

#### A. Congress Used Expansive And Unqualified Language In Requiring Enhanced Penalties For A "Second Or Subsequent Conviction"

1. This Court frequently has stated that in determining the meaning of a statute the inquiry must begin with the language chosen by Congress. *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990); *United*

*States* v. *Turkette*, 452 U.S. 576, 580 (1981). We submit that "[i]n this case it is also where the inquiry should end, for where, as here, the statutory language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). Contrary to petitioner's argument, the plain meaning of the phrase "second or subsequent conviction under this subsection" requires the conclusion "that a conviction on a second firearms count, even though charged in the same indictment as the first, gives rise to the enhanced sentence." *United States* v. *Raynor*, 939 F.2d 191, 193 (4th Cir. 1991).

Petitioner rests his argument principally on the submission (Br. 11-15) that the word "conviction" has two meanings—"it can mean either the return of a jury verdict of guilt or the entry of a final judgment on that verdict." Pet. Br. 11. Petitioner concedes that no court save the Tenth Circuit has read the word "conviction" in Section 924(c) to mean the judgment entered upon the jury's verdict, but he argues that the other courts have erroneously failed to explore the various dictionary definitions of the word. Pet. Br. 12-13. Petitioner's argument, however, ignores the context in which the word "conviction" appears.

A statute "is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital*, 112 S. Ct. 570, 574 (1991) (citations omitted); see also *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Section 924(c) provides that "[i]n the case of [a defendant's] second or subsequent conviction



* * * [he] shall be sentenced to imprisonment for twenty years." As used in the statute, the word "conviction" cannot mean a judgment of conviction, as petitioner contends, because such a judgment reflects not only the verdict but also the sentence. See Fed. R. Crim. P. 32(b)(1). When a judgment has been entered, the defendant has already been sentenced. A provision prescribing the sentence the defendant is to receive upon such a "conviction" makes no sense. The only possible meaning of the word "conviction" as used in Section 924(c), therefore, is the one that petitioner is at pains to discard—a finding of guilt by a court or jury. See *Webster's Third International Dictionary* 499 (1986) ("conviction" means "the act of proving, finding, or adjudging a person guilty of an offense or crime, * * * esp[ecially] by a jury and on which the judgment is based"). Indeed, that meaning is confirmed by Congress's use of the word "convicted" to mean "found guilty" in the immediately following sentence, which prohibits courts from placing on probation or suspending "the sentence of any person convicted of a violation of this subsection."

That conclusion is also confirmed by this Court's decision in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), which held that a defendant was "convicted" within the meaning of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 226, 18 U.S.C. 922(g)(1) and (h)(1), once his guilty plea was noted by a state court, even though no judgment of conviction was entered because of the State's deferred sentencing procedure. As the Court recognized in *Dickerson*, the language Congress used in that related statute was "sweeping": "No modifier

is present, * * * nothing suggests any restriction on the scope of the term 'convicted,' * * * [and] [n]othing on the face of the statute suggests a congressional intent to limit its coverage." *Dickerson*, 460 U.S. at 111, quoting *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). Thus, although "the terms 'convicted' and 'conviction' do not have the same meaning in every federal statute," *Dickerson*, 460 U.S. at 112 n.6, the Court found "no reason whatsoever to suppose that Congress meant that term to apply only to one against whom a formal judgment has been entered" where "Congress' intent * * * was to keep firearms out of the hands of presumptively risky people." *Ibid.* Because the provision considered by the Court in *Dickerson* was re-enacted as part of the Gun Control Act of 1968, of which Section 924(c) was a part, see *Scarborough* v. *United States*, 431 U.S. 563, 569 n.8 (1977), this Court should give the same "full effect" to the identical word used in Section 924(c). See *Dickerson*, 460 U.S. at 117 (provisions of simultaneously enacted firearms statute should be treated "*in pari materia* in construing statutory language identical to that at issue here").[2]

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[2] The majority in *Abreu* dismissed the Court's opinion in *Dickerson* as "not helpful," partly because the statute at issue in *Dickerson* applied to defendants who were "indicted" as well as "convicted," and partly because the result in *Dickerson* was effectively overruled by subsequent amendment of the statute. See *United States* v. *Abreu*, 962 F.2d at 1449 n.3.

Neither reason is sufficient to disregard the broad interpretation given to the term "convicted" by this Court in *Dickerson*. First, the fact that Congress had also imposed disabilities on those under indictment was not essential to the Court's conclusion that Congress meant the term "convicted" to apply to a finding of guilt. Second, while Congress overruled the result in *Dickerson* by providing that the existence of a state conviction is to be determined under state law, see 18 U.S.C. 921(a)(20), that change did not affect *Dickerson*'s conclusion that, when the existence of a conviction turns on federal law, the terms "convicted" and "conviction" are satisfied by the entry of a guilty plea or the return of a jury verdict.



Like the word "conviction," the terms "second" and "subsequent" are not defined by Section 924(c). Those terms must, therefore, "be given their ordinary meaning." *Chapman* v. *United States*, 111 S. Ct. 1919, 1925-1926 (1991); *Moskal* v. *United States*, 111 S. Ct. 461, 468-470 (1990). The term "second" means the "number two in a countable series" or "one that is next after the first in rank, position, or any other serial order." *Webster's Third International Dictionary* 2050 (1986). The term "subsequent" means "following in time * * * or in order of place." *Webster's Third International Dictionary* 2278 (1986). Thus, the phrase "second or subsequent conviction under this subsection" simply refers to any finding of guilt under Section 924(c) other than the first such finding. As the Fourth Circuit explained, "[t]he second conviction is the one that follows the first, either in time or in a number sequence, and the subsequent conviction is any that follows the second, either in time or in number sequence. The enhancement * * * mandated by the statute does not depend on satisfying conditions that the second or subsequent conviction be by reason of a different indictment, or that the sentence be imposed on the first conviction before the enhancement can apply to the second, or that the defendant have served the sentence on the first." *United States* v. *Raynor*,

939 F.2d at 193. See also *United States* v. *Bennett*, 908 F.2d at 194.

2. The same conclusion is suggested by the need to avoid the anomalous consequences that would result from construing the phrase "second or subsequent conviction" to require a judgment of conviction. See *United States* v. *Brown*, 333 U.S. 18, 26-27 (1948). As we have noted, the statute's reference to a second or subsequent conviction cannot be read in context to refer to a judgment of conviction because no sentence can be imposed upon such a "conviction." In the face of that obstacle, petitioner's argument appears to be that the first conviction (to which the clause implicitly refers) must be embodied in a judgment, but not the second or subsequent conviction on which sentence is yet to be imposed. Petitioner does not explain, nor is it apparent, why the word "conviction" should have a different meaning for each of its referents. Cf. *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992) (noting the "basic canon of statutory construction that identical terms within an Act bear the same meaning").

Congress could not have intended the applicability of the enhanced sentence provision to turn on whether a separate judgment of conviction has been entered on the first offense. If that were the law, prosecutors could simply charge and try each Section 924(c) offense and its related substantive crime seriatim, thereby ensuring the entry of a judgment of conviction on each succeeding offense before the next violation of Section 924(c) was charged and tried. See *United States* v. *Rawlings*, 821 F.2d at 1546. See also *United States* v. *Raynor*, 939 F.2d at 193; *United States* v. *Nabors*, 901 F.2d at 1358; *United States* v. *Foote*, 898 F.2d at 668. Congress could not



have intended the application of the enhancement provision to turn on the prosecutor's discretionary decision to join offenses in a single indictment. See *United States* v. *Raynor*, 939 F.2d at 193; *United States* v. *Rawlings*, 821 F.2d at 1546.

The Tenth Circuit sought to avoid that result by "requir[ing] that the offense underlying [the second or subsequent] conviction be committed after a defendant has received a judgment of conviction on the prior offense." *United States* v. *Abreu*, 962 F.2d at 1452. The Tenth Circuit, however, found no textual basis for imposing that additional requirement. It relied instead on "the legislative purpose upon which all subsequent-offense statutes are grounded," which the court believed is "to punish a second offender more severely when he has not learned from the penalty imposed for his prior offense" and not "before that penalty has had the chance to have the desired effect on the offender." *Id.* at 1452-1453. We believe the Tenth Circuit erred in characterizing the purpose of Section 924(c) and in construing Section 924(c) in light of that purpose to reach a conclusion contrary to its plain language.

No dictionary definition of the word "conviction" encompasses both the entry of judgment and the completion of the sentence prescribed by that judgment. Thus, the Tenth Circuit's conclusion does not represent a choice from among the various interpretations suggested by the purportedly ambiguous language of Section 924(c). Its conclusion is based solely on that court's assessment of the purpose of Section 924(c)'s enhancement provision. The Tenth Circuit erred, however, in assuming that the only justification for an enhanced sentence for a second offense is the defendant's failure to learn from his previous punish-

ment. As this Court made clear in *Moore* v. *Missouri*, 159 U.S. 673 (1895), the case on which the Tenth Circuit relied, enhanced penalties may be justified on a variety of grounds. A defendant's punishment may be increased "because by his persistence in the perpetration of crime, he had evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence," or simply because "repetition of the offence aggravates guilt." *Moore* v. *Missouri*, 159 U.S. at 677 (quotations omitted). In enacting Section 924(c), Congress was entitled to rely on the commonsense notion, amply demonstrated by the facts of this and similar cases, that violent felonies and narcotics crimes are often committed in sprees, that a powerful deterrent is needed to persuade a culprit not to use a firearm in committing those dangerous felonies, and that one who nonetheless engages in such antisocial conduct requires an extended period of incapacitation. "[T]o construe the statute to require that the defendant complete his sentence on the first [conviction] before becoming subject to the enhancement provisions for the second would immunize the defendant from sentencing enhancement for all firearms offenses committed before the defendant was indicted, tried, convicted and sentenced for the first" and would "result in [the] rewriting [of] the statute, a task not committed to the judiciary." *United States* v. *Raynor*, 939 F.2d at 193-194.

3. Other criminal statutes make clear that when Congress intends to enact a recidivist statute of the type discussed by the Tenth Circuit, it knows how to choose the language necessary to achieve that result. See *Lewis* v. *United States*, 445 U.S. 55, 62 (1980). Thus, the former Dangerous Special Offender statute,



18 U.S.C. 3575(e) (1976), provided enhanced penalties if "the defendant ha[d] previously been convicted * * * for two or more offenses committed on occasions different from one another" *and* if "for one or more of such convictions the defendant ha[d] been imprisoned prior to the commission of [the instant] felony." Congress likewise used explicit language when it chose to require at least a finding of guilt of one offense prior to the commission of a second offense, using the words "prior" or "previous" together with verb tenses that make clear that the second offense must be committed after a finding of guilt on the first. Thus, Congress limited the enhanced penalty provisions of Section 924(e) to a person who "*violates* section 922(g) * * * and *has* three *previous* convictions * * * for a violent felony or a serious drug offense" (emphasis added). Similarly, the Sentencing Reform Act directs the Sentencing Commission to adopt sentencing ranges at or near the statutory maximums for "a defendant [who] * * * *has previously been* convicted of two or more *prior* felonies, each of which is * * * a crime of violence; or [a drug trafficking crime]." 28 U.S.C. 994(h) (emphasis added).[3] The language chosen by

[3] When Congress authorized doubling the available term of imprisonment for persons committing a "second or subsequent" drug trafficking offense under 21 U.S.C. 962, it provided a definition "[f]or purposes of this section" of the phrase "second or subsequent offense" that requires that "prior to the commission of such offense, one or more prior convictions of [the defendant] for a [narcotics] felony * * * have become final." 21 U.S.C. 962(b). Congress could have included the same definitional language in Section 924(c)(1) if it had meant the language there to have the same meaning as in Section 962(b). *United States* v. *Raynor*, 939 F.2d at 194. In fact, Congress's apparent belief that a limiting definition was necessary for purposes of Section 962 indicates its

Congress in Section 924(c) is far broader and embodies a theme of pure deterrence that, contrary to the Tenth Circuit's conclusion, "suggests that the lesson is to be learned, if necessary, all at once." *United States* v. *Bernier*, 954 F.2d at 820.

### B. The Legislative History Of Section 924(c) Reflects A Purpose To Impose Enhanced Penalties On Offenders Who Are Found Guilty Of Multiple Violations Under The Statute, Without Regard To The Timing Or Order Of Those Convictions

Because the language of Section 924(c), read in context, answers the question presented by this case, there is no need to consult the legislative history for further guidance as to the statute's meaning. In any event, however, to the extent that it sheds light on the question at all, the legislative history supports the interpretation of the statute adopted by the court below.

Section 924(c) originated as a floor amendment to the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1223. Consequently, any further "clues to congressional intent" must be found "in the sparse pāges of floor debate that make up the relevant legislative history." *Busic* v. *United States*, 446 U.S. 398, 404-405 & n.9 (1980). Nothing in that history evinces a congressional intent to limit the enhanced sentence provision of Section 924(c) to offenders who have been convicted of violating Section 924(c) prior to the commission of the instant offense, much less to offenders who have already served their sentence for their first Section 924(c) offense. To the contrary, both the 1968 debates and

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belief that the "second or subsequent" language would not otherwise have that limited meaning.



the debates and reports relating to subsequent amendments suggest that Members of Congress understood the phrase "second or subsequent conviction" to refer simply to the commission of additional offenses that result in convictions.

The House bill (H.R. 17735) and the Senate bill (S. 3633) for what became the Gun Control Act of 1968 each contained various firearms restrictions, but neither imposed special penalties for the use of firearms in the commission of felonies. There was, however, substantial sentiment on the floor of the House for a provision that would both incapacitate offenders who used or carried firearms in the commission of felonies and deter others from doing so through the imposition of harsh penalties. See, *e.g.*, 114 Cong. Rec. 22,230 (1968) (remarks of Rep. Casey); *id.* at 22,231 (Rep. Edmondson); *id.* at 22,233 (Rep. Cramer); *id.* at 22,234 (Rep. Harsha); *id.* at 22,237, 22,245 (Rep. Minshall); *id.* at 22,237 (Rep. Rodgers); *id.* at 22,239-22,240 (Rep. Pucinski); *id.* at 22,242 (Rep. May); *id.* at 22,243 (Rep. Latta); *id.* at 22,243, 22,246 (Rep. Pollock); *id.* at 22,244 (Rep. Randall).

What eventually became Section 924(c) had its genesis in competing floor amendments offered by Representatives Casey and Poff. Representative Casey's amendment provided that criminals who use or carry firearms in the commission of designated state or federal offenses were subject to imprisonment for ten years for a "first offense" and 25 years for a "second or more offense." 114 Cong. Rec. 22,229 (1968). Under Representative Poff's amendment, anyone who used or carried a firearm during the commission of a federal offense was subject to a mandatory minimum one-year sentence, but "[i]n

the case of his second or subsequent conviction" was subject to an enhanced mandatory minimum five-year term of imprisonment. *Id.* at 22,231. The Poff amendment was ultimately adopted by the House (*id.* at 22,248) and a modified version of it became part of the Gun Control Act of 1968. See H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968).[4]

[4] Following passage of a different bill by the Senate, the conference committee accepted in large measure the House version of Section 924(c). However, the conference committee deleted altogether Representative Poff's prohibition on concurrent sentences and made the provision eliminating probation and suspended sentences applicable only to second and subsequent convictions. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968). The conference committee's version of Section 924(c) was ultimately accepted by the House (114 Cong. Rec. 30,587 (1968)) and the Senate (*id.* at 30,183), and the bill was signed by the President on October 22, 1968. As noted below, Congress has amended Section 924(c) several times since 1968. While some of those amendments changed the penalty ranges applicable to second or subsequent convictions, none altered the "second or subsequent conviction" language itself.

As it was originally enacted, Section 924(c) provided as follows:

> Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

Pub. L. No. 90-618, § 102, 82 Stat. 1223, 1224 (Oct. 22, 1968).



The record of the House debate reveals that the points of contention between Representative Casey and Representative Poff stemmed from Representative Casey's desire to cover the use of firearms during the commission of state felonies, and from Representative Poff's advocacy of somewhat lower but mandatory penalties. See 114 Cong. Rec. 22,229-22,248 (1968). There is no hint in the debates that anyone believed that Representative Poff's reference to "second or subsequent convictions" differed in any significant respect from Representative Casey's reference to "second or more offense[s]." On the contrary, several congressmen, including Representative Poff, used the terms "second conviction" and "second offense" interchangeably. See, *e.g.*, *id.* at 22,231, 22,236 (Rep. Poff); *id.* at 22,234 (Rep. Harsha); *id.* at 22,237 (Rep. Minshall); *id.* at 22,243 (Rep. Pollock) (equating "second conviction" with a "second instance" of using a firearm to commit a felony); *id.* at 22,245 (Rep. Pollock). See also H.R. Conf. Rep. No. 1956, *supra*, at 31-32. Indeed, Representative Poff described his amendment as "retain[ing] [the] central thrust" of the Casey amendment while "strengthen[ing]" it by "provid[ing] that the penalties cannot be suspended and that probation cannot be granted." 114 Cong. Rec. 22,231 (1968).

In addition, the 1968 debates reflect the intention of Section 924(c)'s supporters that its enhanced penalties be invoked whenever an offender uses or carries a firearm for the second time during the commission of a federal offense. As Representative Poff

stated, the purpose of the mandatory penalty provisions contained in his amendment was "to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time." 114 Cong. Rec. 22,231 (1968). Similarly, citing the need "to take the unlawful and dangerous gunslinger out of circulation," Representative Pollock stated that the enhanced penalty provision would apply to any criminal "who takes a gun and commits a felonious and heinous crime of violence [for] the second time." *Id.* at 22,245. Finally, noting that innocent lives are at risk every time a person commits a crime while using or carrying a firearm, Representative Horton stated that the enhancement provision "singl[es] out repeat offenders" who commit "second or subsequent offenses." *Id.* at 22,247-22,248.

The congressional debates and reports relating to later amendments of Section 924(c) likewise reflect the interchangeable use of the words "offense" and "conviction." See, *e.g.*, 115 Cong. Rec. 34,838-34,840 (1969); H.R. Conf. Rep. No. 1768, 91st Cong., 2d Sess. 20-21 (1970); 116 Cong. Rec. 35,734-35,735 (1970). Thus, for example, during the Senate debates that preceded the 1970 amendment to Section 924(c), Senator Mansfield described as follows the penalties available under the proposed bill:

> The criminal gun user—first and subsequent offenders—would be penalized separately for choosing to carry or use a gun * * *. With regard to the first offender—that is, the man *who for the first time commits a crime using or carrying a gun*—the bill provides that the court be required to sentence the man for from 1 to 10 years * * *. For a second or subsequent offender the mandatory sentence of from 2 to 25 years is provided in its fullest sense. * * * [T]his bill provides for the first time a separate and additional penalty for the mere act of choosing to use or carry a gun in commiting a crime under Federal law. *If that choice is made more than once*, the offender can in no way avoid a prison sentence regardless of the circumstances.



115 Cong. Rec. 34,838 (1969) (emphasis added). See also H.R. Rep. No. 495, 99th Cong., 2d Sess. 28 (1986).

The 1988 amendment to Section 924(c) is particularly worthy of note. Among other changes, that amendment increased from 10 to 20 years the penalty that must be imposed in the event of a "second or subsequent conviction." That increase in the available punishment postdated the Eleventh Circuit's decision in *Rawlings*, *supra*, which was then the only published decision by any court of appeals construing the "second or subsequent" language in Section 924(c). Not only do the floor statements relating to the amendment continue the practice of using the words "conviction" and "offense" interchangeably, *e.g.*, 134 Cong. Rec. S14,071 (daily ed. Oct. 3, 1988); *id.* at S17,365 (daily ed. Nov. 10, 1988), but they reflect no intention to change the interpretation announced by *Rawlings*. In light of the settled principle that "Congress normally can be presumed to have had knowledge of the interpretation given" to sections of an old law incorporated into a new enactment, *Lorillard* v. *Pons*, 434 U.S 575, 581 (1978); see also *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987)

(Congress is "presumed to act" with full awareness of established judicial interpretations), Congress's failure to express any disagreement with that interpretation is particularly damaging to petitioner's claim here. It is unlikely that Congress decided that it was imperative to increase the punishments available for repeat offenders without troubling to investigate how those punishments were being meted out.

In sum, both the legislative debates on the amendment that became Section 924(c) and the floor statements and reports relating to the amendments effected in later years fail to support—indeed, they generally contradict—petitioner's view that the enhancement provision should come into play only when the defendant commits an offense after the entry of a judgment of conviction and the service of his sentence thereunder.

### C. The Rule Of Lenity Casts No Doubt On The Court Of Appeals' Conclusion In This Case

The essence of petitioner's submission is his invocation of the rule of lenity. He bases his reliance on the rule of lenity primarily on the purported ambiguity that flows from the fact that the terms used by Congress have several different dictionary definitions. Petitioner also contends that the rule of lenity should be invoked because "a 105-year sentence of imprisonment, upon [his] first appearance in court for any violation of [S]ection 924(c), is so glaringly unjust that the Court cannot but question whether Congress intended such an application." Pet. Br. 24. We submit that petitioner misconceives the circumstances that call for application of the rule of lenity.



This Court has emphasized repeatedly that the rule of lenity is not applicable unless there is a " 'grievous ambiguity or uncertainty in the language and structure of the Act,' *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), such that even after a court has 'seize[d] every thing from which aid can be derived' it is still 'left with an ambiguous statute.' " *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991), quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). See also, *e.g.*, *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 849 (1991); *Moskal* v. *United States*, 111 S. Ct. at 465; *Russello* v. *United States*, 464 U.S. 16, 29 (1983).

The rule of lenity does not apply here. A statute is not " 'ambiguous' for purposes of lenity merely because it [is] *possible* to articulate a more narrow construction than that urged by the Government," *Moskal* v. *United States*, 111 S. Ct. at 465 (emphasis in original), or because there is a division of judicial authority over the proper construction. If that were sufficient, "one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one." *Ibid.* See also *Chapman* v. *United States*, 111 S. Ct. at 1929; *United States* v. *Rodgers*, 466 U.S. 475 (1984). This Court has "always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended

scope even *after* resort to" the standard tools of statutory interpretation. *Moskal* v. *United States*, 111 S. Ct. at 465 (emphasis in original); *Chapman* v. *United States*, 111 S. Ct. at 1929. As explained above, and as eight courts of appeals have held, the text of the statute directs that the enhanced sentence be imposed for each violation after the first, and the legislative history does not undermine that conclusion in any way. Thus, petitioner cannot establish the requisite ambiguity simply by pointing to the existence of multiple dictionary definitions of the terms used by Congress, without reference to the context in which those terms are used and the anomalous consequences that would result from subscribing to the alternatives.

Petitioner is also mistaken in believing that the length of his sentence calls for application of the rule of lenity. That sentence, while concededly severe, is hardly disproportionate to petitioner's violent crime spree, during which he committed six bank robberies at gun point. Petitioner's series of bank robberies constituted serious crimes so fraught with danger that Congress has long authorized a penalty of 25 years' imprisonment for each of them, quite apart from the provisions of Section 924(c). See 18 U.S.C. 2113(d). That petitioner was able to evade law enforcement and commit numerous felonies in the interim does not render his total sentence "so 'absurd or glaringly unjust,'" *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984) (quoting *Sorrells* v. *United States*, 287 U.S. 435, 450 (1932)), as to raise a "reasonable doubt" about Congress's intent. *Moskal* v. *United States*, 111 S. Ct. at 465. Under these circumstances, there is no occasion to resort to the rule of lenity.



## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

WILLIAM C. BRYSON
*Deputy Solicitor General*

MIGUEL A. ESTRADA
*Assistant to the Solicitor General*

ROBERT J. ERICKSON
*Attorney*

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